

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

USDA  
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Docket Nos. 09-0155 and 10-0418

In re: Terranova Enterprises, Inc., a Texas corporation  
d/b/a Animal Encounters, Inc.;  
Douglas Keith Terranova, an individual;  
Will Ann Terranova, an individual;  
Farin Fleming, an individual;  
Craig Perry, an individual d/b/a  
Perry's Exotic Petting Zoo;  
Eugene ("Trey") Key, III, an individual;  
and Key Equipment Company, Inc.,  
an Oklahoma Corporation d/b/a  
Culpepper & Merriweather Circus,

Respondents.

**MISCELLANEOUS DECISION AND ORDER DENYING  
ATTORNEY FEES AND COSTS TO BRUCE MONNING, ESQ.,  
COUNSEL FOR TERRANOVA RESPONDENTS**

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., Douglas Terranova, Will Ann Terranova, and Farin Fleming ("Terranova Respondents"); as well as the other named Respondents, who were represented by other counsel. A hearing in docket number 09-0155 commenced on February 17, 2011 and continued through February 25, 2011, in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. A hearing in docket number 10-0418 was held on June 1 and 2, 2011 in Dallas, Texas.

On December 20, 2011, I issued Findings of Facts and Conclusions of Law in Decisions and Orders that addressed the parties separately. I dismissed all allegations involving Farin Fleming, and I dismissed all allegations filed against Will Ann Terranova except one involving record keeping. I found that certain of the Complainant's allegations against Douglas Terranova and the corporate entity Terranova Enterprises, Inc. were not substantiated.

On March 9, 2012, counsel for the Terranova Respondents, Bruce Monning, Esq., moved for an award of attorney fees. On April 18, 2012<sup>1</sup>, counsel for Complainant filed objections to an award of fees, alleging that the application for an award of fees was untimely filed. Complainant further alleged that Respondents were not prevailing parties and that the Government's position was substantially justified.

### **DISCUSSION**

An award of attorney fees for the successful prosecution of claims is governed by the Equal Access to Justice Act ("EAJA") section of the Administrative Procedures Act ("APA"). 5 U.S.C. §504. An award of attorney's fees against the Government is appropriate if (1) the applicant is a prevailing party; (2) the Government's position was not "substantially justified; and (3) an award would not be rendered unjust due to special circumstances. See, Charles Davidson v. USDA, 62 Agric. Dec. 49 (2003), citing Sims v. Apfel, 238 F.3d 597, 699-600 (5<sup>th</sup> Cir. 2000). An applicant for attorney fees may be said to be a prevailing party if the applicant succeeded on any significant issue. Id.

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<sup>1</sup>Due to delay at the Hearing Clerk for the Office of Administrative Law Judges for the United States Department of Agriculture, the motion was not served upon Complainant until at the earliest, March 23, 2012. Accordingly, Complainant's objection is timely within 7 C.F.R. § 1.143(d).

In the instant matter, I find that Farin Fleming and Will Ann Terranova were prevailing parties in defending the complaints brought against them by Complainant USDA. The Government successfully proved only one allegation against Will Ann Terranova, regarding failure to keep certain required records. None of the allegations brought against Farin Fleming were established. I further find that with respect to certain significant allegations, Respondent Douglas Terranova and the corporate Respondent Terranova Enterprises, Inc. were prevailing parties, as I dismissed many allegations brought against those Respondents regarding the birth and rearing of tiger cubs belonging to other Respondents. I also dismissed significant allegations regarding the handling of elephants.

A prevailing party must file an application for fees within thirty (30) days after the final disposition of a proceeding. 5 U.S.C. § (a)(2); 7 C.F.R. § 1.193. The date of a final disposition is “the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding...becomes final and unappealable, both within the Department and to the courts.” 7 C.F.R. § 1.193(b). In addition, “days” is defined by prevailing regulations as “calendar days”, and therefore intervening weekends or holidays are not excluded from the computation of time. 7 C.F.R. § 1.180(a).

Pursuant to 7 C.F.R. § 1.142(c), my Decisions became the final disposition by the Secretary of these matters on the thirty-fifth (35th) day after service on Respondents, because no appeal was filed by any party to the proceeding to the Judicial Officer of the U.S. Department of Agriculture. Therefore, an application for EAJA fees had to be filed within thirty (30) days of that final disposition date to be deemed timely.

Unfortunately, Respondents' counsel's application for fees related to his services for all of his clients was untimely filed on March 9, 2012. As Complainant has noted, Respondents' counsel received the Decision and Order pertaining to his client Farin Fleming on December 29, 2012, and since no appeal was filed by either party, the date of final disposition of that Decision was February 2, 2012. Therefore, the last possible day for filing an application for fees for services rendered to that client would have been March 3, 2012, which is thirty (30) days after the final disposition of the case. Mr. Monning received my Decisions and Orders for Respondents Will Ann Terranova, Douglas Terranova, and Terranova Enterprises, Inc. on December 27, 2011, and those dispositions became final on January 31, 2012.

Despite the evidence that demonstrates that Respondents were to some extent prevailing parties, counsel's application was untimely filed and I am constrained from awarding fees. I find no reason to address whether the Government's position was substantially justified. In addition, I need not determine whether the circumstances demonstrate that an award of fees would be unjust.

Accordingly, I must DENY the application for fees. I find it worthwhile to note that if fees were rewarded, Respondents' counsel would be limited to a maximum hourly attorney rate of \$150.00, pursuant to 7 C.F.R. § 1.186 (2011).


#### **ORDER**

For the reasons set forth herein, supra., the application for attorney fees by counsel for the Terranova Respondents is DENIED.

This Decision and Order shall become effective and final 35 days from its service upon Respondents' counsel unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 25<sup>th</sup> day of April, 2012 at Washington, DC.

  
Janice K. Bullard  
Administrative Law Judge